



DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 555

[Docket No. NHTSA-2018-0103]

Denial of Petition for Reconsideration;

Temporary Exemption from Motor Vehicle Safety and Bumper Standards

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Denial of petition for reconsideration.

SUMMARY: This document denies a petition for reconsideration submitted by Advocates for Highway and Auto Safety, Center for Auto Safety, Consumer Reports, Consumer Federation of America, and Ms. Joan Claybrook (collectively, the “Petitioners”) of a final rule amending NHTSA’s regulation on temporary exemption from the Federal Motor Vehicle Safety Standards (FMVSS). The final rule eliminated the provision calling for the agency to determine that an application for a temporary exemption from any FMVSS or bumper standard or for a renewal of exemption is complete before the agency publishes a notification summarizing the application and soliciting public comments on it.

DATES: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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This document denies a petition for reconsideration submitted by the Petitioners requesting reconsideration of a December 26, 2018 final rule (83 FR 66158) amending NHTSA's regulation on temporary exemption from the FMVSS. The intended effect of the final rule was to solicit public comments on a petition more quickly than had been the case under part 555 prior to the change in procedure.

I. Background

The National Traffic and Motor Vehicle Safety Act (Safety Act), as amended, authorizes the Secretary of Transportation to exempt, on a temporary basis, under specified circumstances, and on terms the Secretary deems appropriate, motor vehicles from an FMVSS or bumper standard. This authority is set forth at 49 U.S.C. 30113. The Secretary has delegated the authority for implementing this section to NHTSA.¹

In exercising this authority, NHTSA must look comprehensively at the request for exemption and find that an exemption would be consistent with the public interest and with the

¹ 49 CFR 1.94

objectives of the Safety Act.² In addition, the Secretary must make at least one of the following more-focused findings, which NHTSA commonly refers to as the “basis” for the exemption:

- (i) compliance with the standard[s] [from which exemption is sought] would cause substantial economic hardship to a manufacturer that has tried to comply with the standard[s] in good faith;
- (ii) the exemption would make easier the development or field evaluation of a new motor vehicle safety feature providing a safety level at least equal to the safety level of the standard;
- (iii) the exemption would make the development or field evaluation of a low-emission motor vehicle easier and would not unreasonably lower the safety level of that vehicle; or
- (iv) compliance with the standard would prevent the manufacturer from selling a motor vehicle with an overall safety level at least equal to the overall safety level of nonexempt vehicles.³

Per the Safety Act, once NHTSA receives a petition for an exemption, the agency is required to publish a notice of receipt of the petition and provide the public the opportunity to comment. However, NHTSA does have a certain amount of discretion to set procedural rules regarding time and way in which a petition is filed, as well as the contents of the petition.⁴

NHTSA’s procedural regulations implementing these statutory requirements are codified at 49 CFR Part 555, “Temporary Exemption from Motor Vehicle Safety and Bumper Standards.” Per the requirements in 49 CFR 555.5, a petition for a temporary exemption must, among other

² 49 U.S.C. 30113(b)(3)(A).

³ 49 U.S.C. 30113(b)(3)(B).

⁴ 49 U.S.C. 30113(b)(2).

things, provide supporting documentation that would enable NHTSA to make the findings required to grant the exemption under one of the four exemption bases. In addition, the petition must also explain why the exemption would be in the public interest and consistent with the objectives of the Safety Act. NHTSA's procedures for processing exemption petitions once they are received are described in 49 CFR 555.7.

The final rule made no changes to the ability of the public to comment on a published petition for exemption, nor to the substantive requirements for a petition. The opportunity for the public to comment on a petition remains the same today as it has always been: the agency publishes a notification in the Federal Register summarizing the application and inviting public comment on whether the application should be granted or denied. Before NHTSA issued its December 26, 2018, final rule (83 FR 66158), however, this Federal Register notification would only be published after the agency determined that the application was complete (i.e., that the application included all the information required under 49 U.S.C. 30113 and 49 CFR part 555). However, if NHTSA found that the application was incomplete, NHTSA informed the applicant, pointed out the areas of insufficiency, and stated that the application would not receive further consideration until the required information was submitted. Prior to the final rule, the agency would not make the application available to the public and request public comment at this stage in the process unless the additional required information was submitted. Only then would the agency publish the notification requesting public comment.

Importantly, the final rule did not amend 49 CFR 555.7(d) or (e), which describe what steps NHTSA must take after the agency determines whether an exemption petition contains "adequate justification" to grant the petition. 49 CFR 555.7(d) states that, if NHTSA determines that the application does not contain adequate justification to grant an exemption after

considering the application and the public comments, the Administrator denies the petition and notifies the petitioner in writing. 49 CFR 555.7(e) states that, if the Administrator determines that the application does contain adequate justification to grant the petition, the Administrator grants the petition and notifies the applicant in writing. Under both cases, the Administrator also publishes a notification in the Federal Register stating the decision to grant or deny the petition, and the reasons for the decision.

The December 26, 2018 final rule amended 49 CFR 555.7 by eliminating the provision stating that the agency will not publish a notice of receipt of an exemption petition to solicit public comments prior to making a determination that the petition is “complete.”⁵ As was noted in the final rule, the reason for this was NHTSA’s difficulty in differentiating between incomplete petitions (for which, prior to the final rule, a notice of receipt would not be published) and petitions which were complete, but which failed to provide adequate justification to grant (for which, prior to the final rule, a notice of receipt would be published). This was especially the case in the context of complex petitions involving new or innovative vehicle designs, which has in the past led to delays in processing these petitions.⁶ This final rule did not change the substantive requirements that exemption petitions must meet; the amended regulation continues to provide that the agency will determine whether an application for exemption contains adequate justification in deciding whether to grant or deny the application.⁷

II. Petition for Reconsideration and Agency Response

⁵ 83 FR 66158 (Dec. 26, 2018).

⁶ *Id.*

⁷ *Id.*

The Petitioners submitted a petition for reconsideration requesting that NHTSA stay the effective date of the December 26, 2018 final rule, and to proceed with a new notice of proposed rulemaking along with a notice and comment period.

First, the Petitioners argue that by issuing the final rule, NHTSA did not follow its direct final rulemaking procedures for amendments that involve complex or controversial issues because, pursuant to 49 CFR 553.14, direct final rules may not be issued when they are likely to result in “adverse public comment.” The Petitioners argue that the final rule would have resulted in adverse public comments because the new procedure is controversial among the Petitioners. (Under NHTSA’s direct final rulemaking procedures, if NHTSA receives an adverse comment after issuing a direct final rule, the agency must withdraw the rule and issue an NPRM proposing the amendment.)

Second, the Petitioners argue that, if the agency did not intend for the final rule to be a direct final rule, the agency violated the Administrative Procedure Act’s (APA) notice and comment requirement because the agency did not issue an NPRM proposing the change.

Third, the Petitioners argue that the final rule is not in the public interest because it deprives the public of the opportunity to “review issues of great importance to safety” and permits the agency to publish incomplete applications. The Petitioners believe that the regulatory change would impose additional burdens on the public because to fully evaluate an incomplete application and its implications on safety, the public would be required to conduct independent research and investigation to obtain missing information not contained in an incomplete application.

Finally, the Petitioners argue that NHTSA has not put forth data or evidence to show that the requirement of waiting until an application is complete before publication has caused an undue delay or hardship on any applicant, the agency, or the public.

A. This Final Rule was Not Issued as a Direct Final Rule under 49 CFR 553.14

The Petitioners' assumption that NHTSA intended for this rulemaking to be considered a direct final rule, subject to 49 CFR 553.14, is incorrect. The APA includes two circumstances when notice and comment rulemaking procedures do not apply: (1) "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or" (2) "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b). As described below, this rule falls into the first exception, as a rule of agency procedure. NHTSA's direct final rulemaking regulation is primarily directed at the second exception, as it requires a threshold "good cause" finding. *See* 49 CFR 553.14.

In any event, the procedures in 49 CFR 553.14 are not mandatory. 49 CFR 553.14 states that if the Administrator makes a "good cause" finding, "a direct final rule *may* [emphasis added] be issued" according to the direct final rulemaking procedures. Likewise, it provides that: "[r]ules that the Administrator judges to be non-controversial and unlikely to result in adverse public comment *may* [emphasis added] be published as direct final rules,"⁸ thereby giving NHTSA discretion to publish a rule according to the specified "direct final rule" procedures. NHTSA did not purport to issue the final rule that is the subject of this petition according to those procedures. The petitioned final rule did not refer to 49 CFR 553.14 and instead expressly

⁸ 49 CFR 553.14(a).

indicated that it was issued without notice and comment pursuant to the APA exception for procedural rules in 5 U.S.C. 553(b)(3)(A).⁹ Petitioners do not support their claim that NHTSA somehow acted “in violation of” its discretionary direct final rulemaking procedures in 49 CFR 553.14, when the agency instead applied a statutory exception in the APA.

B. Immediate Adoption of a Rule Under the APA

NHTSA fully complied with the APA when it issued a final rule for immediate adoption without a notice and comment period. Section 553(b)(3)(A) of the APA (U.S.C., Title 5) provides that notice and comment procedures do not apply to rules of agency organization, procedure, or practice, except when notice or hearing is required by *statute*. Under this section, an agency may issue a final rule without seeking comment prior to the rulemaking. Procedural rules are agency provisions that are primarily directed toward improving the efficient and effective operations of an agency, not toward the determination of the rights or interests of affected parties.¹⁰ A rule that simply prescribes the manner in which the parties present themselves or their viewpoints to the agency does not alter the underlying rights or interests of the parties.¹¹

The purpose of the petitioned final rule is to expedite the publishing of documents soliciting public comment on exemption applications,¹² which is directly related to improving the efficient and effective operations of the agency. It amended a provision of NHTSA’s regulations concerning the agency’s “[p]rocessing of applications.”¹³ The final rule simply eliminated the

⁹ 83 FR 66158, 66159.

¹⁰ *Clarian Health West, LLC v. Burwell*, 206 F. Supp. 3d 393, 414 (D.D.C. 2016), *rev’d on other grounds*, *Clarian Health West, LLC v. Hargan*, 878 F.3d 346 (D.C. Cir. 2017).

¹¹ *Inova Alexandria Hospital v. Shalala*, 244 F.3d 342, 349 (2001).

¹² 83 FR 66158 (Dec. 26, 2018).

¹³ See revised heading of 49 CFR 555.7.

provision calling for the agency to determine that an application for exemption is complete before publishing a notification summarizing an application and soliciting public comments on it, which is a prescription of the manner in which applicants present themselves to the agency. Therefore, this procedural final rule is not directed toward the determination of the rights or interests of the Petitioners as the Petitioners' public interest argument seems to suggest; it does not alter the underlying rights or interest of interested parties.

Petitioners' assertion that the final rule "contravenes NHTSA's notice-and-comment obligations under the Administrative Procedure Act" is unpersuasive. NHTSA expressly found that the final rule met the exception in APA section 553(b)(3)(A) because "[t]he sole purpose of this rule is to eliminate the provision calling for the agency to determine that a petition is complete before the agency publishes a notification summarizing the petition and soliciting public comments on it. This rule does not impose any additional requirements on exemption applicants or the public. Therefore, NHTSA has determined that notice and public comment are unnecessary."¹⁴ Petitioners provided no explanation for why they believe notice-and-comment procedures apply notwithstanding the APA exception cited by the agency in the final rule.

C. Advantages of Removing Completeness Determination Requirement

Contrary to the assertion by Petitioners, the subject final rule is in the public's interest for several reasons. First, the final rule increases transparency by giving the public the opportunity to thoroughly review exemption applications that otherwise may not have been disclosed to the public or subject to public input. Under the prior rule, NHTSA first had to make a threshold finding before opening a public docket on the petition. If NHTSA found that the application was incomplete, NHTSA informed the applicant, pointed out the areas of insufficiency, and stated

¹⁴ 83 FR 66158, 66159 – 60.

that the application would not receive further consideration until the required information was submitted. The public did not have the opportunity to review the incomplete application. Under the amended rule, the public can review incomplete exemption applications.

Second, under the final rule, both the agency and the public can comprehensively evaluate applications for exemption. Prior to the final rule, only the agency would make a completeness determination, without input on that issue from the public. The final rule increases the public's opportunity to evaluate the application and provide input because the agency will decide whether to grant an exemption application, complete or not, based on the application *and* the public comments. Among its comments, the public can submit opinions as to whether the application is complete. The public gets to see an application sooner as opposed to not seeing it until NHTSA makes a threshold completeness determination. The public can point out what it sees as insufficiencies to the agency; and if the agency agrees, the application will be denied unless it is later supplemented. If an application is supplemented, the public will have access to any supplemental information to the same extent as if the supplement happened before the application became public under the old rule. In addition, the public can, if it so chooses, comment on completeness, or on any other supplemental information submitted through the public comment process.

Finally, the final rule does not impose additional requirements on the public to perform research, as the Petitioners claimed without support. Although published exemption applications may be incomplete, NHTSA is still required to make an "adequate justification" determination based on the information provided by the applicant. An application that lacks merit or critical information will be denied, based on public input and the agency's analysis, regardless of whether there is a threshold completeness determination. A determination that an application is

complete is not a determination that the application should be granted. If NHTSA determines that the application does not contain “adequate justification,” the Administrator denies it and notifies the applicant in writing, pointing out the areas of insufficiency.¹⁵ It is not the public’s duty to perform research to determine areas of insufficiency. The Administrator also publishes in the Federal Register a notification of the denial and the reasons for it, which is available to the public. Further, if a member of the public believes the agency’s explanation for granting an application lacks sufficient supporting arguments and facts, he or she may seek to have the agency reconsider the grant.

D. NHTSA Provided a Reasoned Justification for the Amendment

NHTSA articulated the purpose behind changing this procedural rule in the preamble to the rule. Specifically, NHTSA changed its procedure “to expedite the publishing of documents soliciting public comment on exemption petitions.”¹⁶ Petitioners’ argument that “NHTSA has put forth no data or evidence in the Final Rule that the current requirement of waiting until the application is complete before publishing it in the Federal Register has caused undue delay or hardship on any applicant, the agency, or the public” lacks merit. NHTSA provided a reasoned explanation of its change in procedure. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). NHTSA explained how the prior procedure led to delays.¹⁷ The agency also explained that the prior procedure was unnecessary under the statute, particularly in light of the substantive determination it will continue to make regarding whether a petition contains an adequate justification.¹⁸ Petitioners’ assertions regarding the public interest have not convinced

¹⁵ 49 CFR 555.7(d).

¹⁶ 83 FR 66158, 66159.

¹⁷ *Id.*

¹⁸ *Id.*

the agency that it should return to its prior procedure, which would reduce transparency and delay the ability of the public to obtain and comment on exemption applications.

III. Conclusion

For the reasons discussed above, the agency is denying the Petitioners' petition for reconsideration of the December 26, 2018 final rule (83 FR 66158).

Issued in Washington, D.C., under authority delegated in 49 CFR 1.95 and 501.4.

James Clayton Owens
Acting Administrator

Billing Code: 4910-59-P

[FR Doc. 2020-06403 Filed: 4/6/2020 8:45 am; Publication Date: 4/7/2020]